Martinez v. Ryan, 10-1001. In many states, a defendant may not assert ineffective assistance of trial counsel on direct review; the first time he may assert that claim is in a state collateral proceeding. By a 7-2 vote, the Court held that in such states ineffective assistance of state post-conviction counsel, or the lack of any counsel, can constitute "cause" that can excuse a procedural default that would have barred a federal habeas court from hearing a claim of ineffective assistance of trial counsel. Petitioner Luis Martinez was convicted of two sexual offenses. He did not raise ineffective assistance of counsel on direct appeal because Arizona law did not permit it, reserving such claims for state collateral proceedings. Martinez's direct appeal counsel initiated a state collateral proceeding but then made no claim that trial counsel was ineffective. When Martinez later sought to institute a second state collateral proceeding raising that claim, the Arizona courts held that it was barred because it could have been previously raised. Martinez then filed a federal habeas petition raising ineffective assistance of both trial and post-conviction counsel. The district court denied the petition, holding that Martinez's claim of ineffective trial counsel was defaulted under Arizona law, and post-conviction counsel's failure to raise the claim did not qualify as cause that could excuse the default under *Coleman v. Thompson*, 501 U.S. 722 (1991) . The Ninth Circuit affirmed. In an opinion by Justice Kennedy, the Court reversed.

The Court noted that *Coleman v. Thompson* left open the question whether the Constitution requires states to provide counsel in a collateral proceeding that is the first opportunity to raise a claim of ineffective assistance of trial counsel. (The Court here dubbed such proceedings "initial-review collateral proceedings.") The Court declined, however, to resolve that constitutional issue, deciding the case on the narrower ground that a federal habeas court may excuse a procedural default of an ineffectiveness claim when the claim was not properly presented in state court due to the absence of counsel, or due to the post-conviction attorney's errors, in an initial-review proceeding. The Court acknowledged that *Coleman* held that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause'" that can excuse a procedural default. But it found that *Coleman* "did not present the occasion to apply this principle to determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default." The Court here found that they may.

The Court distinguished initial-review collateral proceedings from other collateral proceedings in that "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claims." And if that results in a "procedural default in a federal habeas proceeding, no court will review the prisoner's claims. The same is not true when counsel errs in other kinds of postconviction proceedings." For this reason, an initial-review collateral proceeding "is in many ways the equivalent of a prisoner's direct appeal as to an ineffective-assistance claim." And the Court held in *Evitts v. Lucey*, 469 U.S. 387 (1985), and reiterated in *Coleman* that attorney errors on direct review *can* excuse a procedural default. The Court added that defendants are "ill-equipped to represent themselves" without at least "a brief from counsel or an opinion of the court addressing their claim of error." In addition, ineffectiveness claims often require investigative work and an analysis of trial strategy that the typical defendant would be unable to perform. These concerns are heightened, found the Court, where the claim is ineffectiveness of trial counsel because the "right to effective assistance of counsel at trial is a bedrock principle in our justice system."

The Court observed that it created the rules regarding when procedural defaults may be excused based on an equitable judgment, and that it was making an equitable judgment here. The Court thus ruled that "when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances": "where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial" and "where appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*." The Court added that, to overcome the default, the prisoner must also show that the ineffective-assistance-of-trial-counsel claim "is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." The Court noted that states are not required to appoint counsel in initial-review collateral proceedings, and that its holding does not extend to other constitutional errors at trial.

Justice Scalia filed a dissenting opinion, joined by Justice Thomas, stating that there will no practical difference between the Court's holding on equitable grounds and a constitutional ruling that counsel is required on ineffectiveness claims. The dissent warned that the Court's

reasoning will not be limited to ineffectiveness claims and that its logic extends to other claims that can only be initially raised on collateral review, such as *Brady* claims and claims based on "newly discovered" evidence. In the dissent's view, the Court's holding is "a repudiation of the longstanding principle governing procedural default," which is that counsel's ineffectiveness can only serve as cause if the state had a constitutional obligation to provide counsel.

8th Amendment / Juvenile LWOP

Miller v. Alabama. In No. 10–9647, petitioner Jackson accompanied two other boys to a video store to commit a robbery; on the way to the store, he learned that one of the boys was carrying a shotgun. Jackson stayed outside the store for most of the robbery, but after he entered, one of his co-conspirators shot and killed the store clerk. Arkansas charged Jackson as an adult with capital felony murder and aggravated robbery, and a jury convicted him of both crimes. The trial court imposed a statutorily mandated sentence of life imprisonment without the possibility of parole. Jackson filed a state habeas petition, arguing that a mandatory life-without-parole term for a 14-year-old violates the Eighth Amendment. Disagreeing, the court granted the State's motion to dismiss. The Arkansas Supreme Court affirmed.

In No. 10–9646, petitioner Miller, along with a friend, beat Miller's neighbor and set fire to his trailer after an evening of drinking and drug use. The neighbor died. Miller was initially charged as a juvenile, but his case was removed to adult court, where he was charged with murder in the course of arson. A jury found Miller guilty, and the trial court imposed a statutorily mandated punishment of life without parole. The Alabama Court of Criminal Appeals affirmed, holding that Miller's sentence was not overly harsh when compared to his crime, and that its mandatory nature was permissible under the Eighth Amendment.

Held: The Eight Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders. Pp. 6–27.

(a) The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper* v. *Simmons*, 543 U. S. 551, 560. That right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' " to both the offender and the offense. *Ibid.*

Two strands of precedent reflecting the concern with proportionate punishment come together here. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. See,

e.g., Kennedy v. *Louisiana,* 554 U. S. 407. Several cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, *Roper* v. *Simmons* held that the Eighth Amendment bars capital punishment for children, and *Graham* v. *Florida*, 560 U. S. ___, concluded that the Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a non-homicide offense. *Graham* further likened life without parold for juveniles to the death penalty, thereby evoking a second line of cases. In those decisions, this Court has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death. See, *e.g., Woodson* v. *North Carolina,* 428 U. S. 280 (plurality opinion). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life without parole for juveniles violates the Eighth Amendment.

As to the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for sentencing purposes. Their "'lack of maturity'" and "'underdeveloped sense of responsibility' " lead to recklessness, impulsivity, and heedless risk-taking. *Roper,* 543 U. S., at 569. They "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And because a child's character is not as "well formed" as an adult's, his traits are "less fixed" and his actions are less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.,* at 570. *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

While *Graham's* flat ban on life without parole was for nonhomicidal crimes, crimes, nothing that *Graham* said about children is crime specific. Thus, its reasoning implicates any life-without-parole sentence for a juvenile, even as a categorical bar relates only to nonhomicidal offenses. Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. The mandatory penalty schemes at issue here, however, prevent the sentence from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. This contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

Graham also likened life-without-parole sentences for juveniles to the death penalty. That decision recognized that life-without-parole sentences "share some characteristics with death sentences that are shared by no other sentences." 560 U. S., at ___. And it treated life without parole for juveniles like this Court's cases treat the death penalty, imposing a categorical bar on its imposition for nonhomicide offenses. By likening life-without-parole sentences for juveniles to the death penalty, *Graham* makes relevant this Court's case demanding individualized sentencing in capital cases. In particular, those cases have emphasized that sentencers must be able to consider the mitigating qualities of youth. In light of *Graham*'s reasoning, these decisions also show the flaws of imposing mandatory life without-parole sentences on juvenile homicide offenders. Pp. 6–17.

(b) The counterarguments of Alabama and Arkansas are unpersuasive. Pp. 18–27.

(1) The States first contend that *Harmelin* v. *Michigan,* 501 U. S. 957, forecloses a holding that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment. *Harmelin* declined to extend the individualized sentencing requirement to noncapital cases "because of the qualitative difference between death and all other penalties." *Id.,* at 1006 (KENNEDY, J., concurring in part and concurring in judgment). But *Harmelin* had nothing to do with children, and did not purport to apply to juvenile offenders. Indeed, since *Harmelin* this Court has held on multiple occasions that sentencing practices that are permissible for adults may not be so for children. See *Roper,* 543 U. S. 551; *Graham,* 560 U. S ___.

The States next contend that mandatory life-without-parole terms for juveniles cannot ve unconstitutional because 29 jurisdictions impose them on at least some children convicted of murder. In considering categorical bars to the death penalty and life without parole, this Court asks as part of the analysis whether legislative enactments and actual sentencing practices show a national consensus against a sentence for a particular class of offenders. But where, as here, this Court does not categorically bar a penalty, but instead requires only that a sentencer follow a certain process, this Court has not scrutinized or relied on legislative enactments in the same way. See, *e.g., Sumner* v. *Schuman,* 483 U. S. 66.

In any event, the "objective indicia of society's standards," *Graham,* 560 U. S., at ___, that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment. Fewer States impose mandatory life-without-parole sentences on juvenile homicide offenders than authorized the penalty (life-without-parole for

nonhomicide offenders) that this Court invalidated in *Graham*. And as *Graham* and *Thompson* v. *Oklahoma,* 487 U.S. 815, explain simply counting legislative enactments can present a distorted view. In those cases, as here, the relevant penalty applied to juveniles based on two separate provisions: One allowed he transfer of certain juvenile offenders to adult court, while another set out penalties for any and all individuals tried there. In those circumstances, this Court reasoned, it was impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice). The same is true here. Pp. 18–25.

(2) The States next argue that courts and prosecutors sufficiently consider a juvenile defendant's age, as well as his background and the circumstances of his crime, when deciding whether to try him as an adult. But this argument ignores that many States use mandatory transfer systems. In addition, some lodge the decision in the hands of the prosecutors, rather than courts. And even where judges have transfer-stage discretion, it has limited utility, because the desionmaker typically will have only partial information about the child or the circumstances of his offense. Finally, because of the limited sentencing options in some juvenile courts, the transfer decision maypresent a choice between a light sentence as a juvenile and standard sentencing as an adult. It cannot substitute for discretion at post-trial sentencing. Pp. 25–27.

No. 10–9646, 63 So. 3d 676, and No. 10–9647, 2011 Ark. 49, ___ S. W. 3d ___, reversed and remanded.

KAGAN, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. BREYER,J. filed a concurring opinion, in which SOTOMAYOR, J., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined. ALITO, J., filed a dissenting opinion, in which SCALIA, J., joined.

§1983 - Habeas

Greene v. Fisher, 10-637, Under 28 U.S.C. §2254(d)(1), as amended by AEDPA, a federal court may not grant habeas relief on any claim that has been "adjudicated on the merits in State court proceedings unless the adjudication of the claim...resulted in a decision that was

contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In a unanimous opinion, the Court held that "clearly established Federal law" for purposes of that provision does not include decisions of the Court that are announced after the last state-court adjudication on the merits, even if announced before the defendant's conviction became final.

Petitioner Eric Greene was convicted of second-degree murder, robbery, and conspiracy after he and four co-conspirators robbed a grocery store and shot and killed the store's owner. Two of the men confessed to the robbery and implicated Greene in their confessions. When the state sought to try all the co-conspirators jointly, Greene moved for severance, arguing that under *Bruton v. United States,* 391 U.S. 123 (1968), the confessions of his nontestifying codefendants could not be introduced against him. The trial court denied the motion to sever but ordered redaction of the confessions to eliminate proper names. On appeal to the Pennsylvania Superior Court, Greene reasserted his *Burton* claim, but the court affirmed his convictions on grounds that the redaction had cured any constitutional problem. Greene subsequently filed a petition for allowance of appeal to the Pennsylvania Supreme Court. While his petition was pending, the U.S. Supreme Court announced in *Gray v. Maryland,* 523 U.S. 185 (1998), that "redactions that replace a proper name" or that "similarly notify the jury that a name has been deleted are similar enough to *Bruton's* unredacted confessions as to warrant the same legal results." The Pennsylvania Supreme Court then granted Greene's petition for allowance of appeal, limited to the question whether admission of the redacted confessions violated Greene's Sixth Amendment rights. After the parties briefed the issue, however, the Pennsylvania Supreme Court dismissed the appeal as improvidently granted without reaching the merits. Greene later filed a federal habeas petition, which federal court denied. The Third Circuit affirmed, holding that "clearly established Federal law" under §2254(d)(1) is the law at the time of the last state-court adjudication on the merits – here, the Pennsylvania Superior Court's decision denying Greene's claim under *Bruton* (at which time *Gray* had not been issued and was therefore not "clearly established"). In an opinion by Justice Scalia, the Court affirmed.

The Court held that the case was controlled by *Cullen v. Pinholster,* 563 U.S.___, 131 S. Ct.1388 (2011), decided the previous term. There, the Court concluded that, in determining whether habeas relief is warranted under §2254(d)(1), a federal court may not consider new evidence, but is limited to the factual record that was before the last state court that actually

adjudicated the defendant's claim on the merits. Likewise, in this case, the Court determined that review under §2254(d)(1) is limited to "clearly established Federal law" that existed at the time of the last state-court adjudication on the merits. In so concluding, the Court rejected Greene's reliance on *Teague v. Lane,* 489 U.S. 288 (1989), which holds that prisoners seeking habeas relief may rely on new constitutional rules of criminal procedure announce before their convictions become final. In the Court's view, *Teague* is not relevant to the §2254(d)(1) inquiry because "[t]he retroactivity rules that govern federal habeas review on the merits – which include *Teague* – are quite separate from the relitigation bar imposed by AEDPA; neither abrogates or qualifies the other."

The Court also rejected Greene's argument that the relevant "decision" against which "clearly established Federal law" should be measured is the decision of the state supreme court disposing of the defendant's appeal, even if that decision did not address the merits of the appeal. The court found this to be an "implausible" reading of §2254(d)(1). According to the Court [t]he words 'the adjudication' in the 'unless' clause obviously refer back to the 'adjudicat[ion] on the merits,' and the phrase 'resulted in a decision' in the 'unless' clause obviously refers to the decision produced *by that same adjudication on the merits."* The Court reasoned that a later affirmance on grounds other than the merits – for example, alternative procedural grounds or, as here, a determination not to *hear the appeal at all* – "would not be a decision *resulting from* the merits of adjudication." The Court thus held that the last state-court adjudication on the merits in Greene's case was the Pennsylvania Superior Court's decision denying his *Bruton* claim. And since that decision predated *Gray,* the concluded that it was neither "contrary to" nor "involved an unreasonable application of" "clearly established Federal law" as it existed at the time. Finally, the Court added that Greene's predicament [was] an unusual one of his own creation" as he missed two potential opportunities to obtain relief under *Gray*: he could have petitioned for certiorari after the Pennsylvania Supreme Court dismissed his appeal, "which would almost certainly have produced a remand in light of the intervening *Gray* decision"; or he could have raised a *Gray* claim through a petition for state postconviction relief.

Cavazos v. Smith – See page 29

Howes v. Fields – See page 21

Lawrence v. Florida, 05-8820. In a 5-4 opinion, the Court held that a certiorari petition that seeks review of the denial of state postconviction relief does not toll the statute of limitations for filing a federal habeas petition. Title 28 U.S.C. §2244(d)(1)—enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—provides that a one-year limitations period is triggered by "the date on which the judgment [of a state court conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review." Under 28 U.S.C. §2244(d)(2), the time is tolled while "a properly filed application for State post-conviction or other collateral review is pending." In this case, Gary Lawrence was convicted in Florida state court of first-degree murder and sentenced to death. The Florida Supreme Court affirmed, and the U.S. Supreme Court denied certiorari on January 20, 1998. Lawrence filed a petition for state post-conviction relief 364 days later. The postconviction court denied the petition and the Florida Supreme Court affirmed, issuing its mandate on November 18, 2002. Lawrence then filed a petition for certiorari asking the U.S. Supreme Court to review the postconviction proceedings. While the petition for certiorari was pending—and 113 days after the Florida Supreme Court issued its mandate in the postconviction case—Lawrence filed a habeas petition in federal district court. The district court dismissed the petition as untimely and the Eleventh Circuit affirmed. In an opinion by Justice Thomas, the Court affirmed.

The Court stated that, "[r]ead naturally, the text of the statute must mean that the statute of limitations is tolled only while state courts review the application" for postconviction relief. The Court quoted language in *Carey v. Saffold*, 536 U.S. 214, 200 (2002), stating that a state application "remains pending" "until the application has achieved final resolution through the State's postconviction procedures." But "[t]his Court is not a part of a 'State's post-conviction procedures' . . . . All that remains is a separate certiorari petition pending before a *federal* court." The Court observed that "AEDPA's exhaustion provision and tolling provision work together," yet "state prisoners need not petition for certiorari to exhaust state remedies." Nor, held the Court, is there any reason to read §2244(d)(2), the tolling provision, to operate in the same manner as §2244(d)(1)(A). The latter provision identifies completion of "direct review" of a conviction as triggering the limitation period; and "direct review" has "long included review by this Court." But §2244(d)(2) does not refer to "direct review; it instead refers solely to'"State postconviction or other collateral review.'" The Court rejected Lawrence's argument that the

state's position would create practical problems because state prisoners would have to file protective federal habeas petitions while their cert petitions are pending. The Court stated that few cert petitions are granted, and if one is granted in such a case the federal habeas court could stay the proceeding. And in the even rarer situation where the state court grants relief to a prisoner and the state successfully petitions for certiorari, "equitable tolling may be available." Finally, the Court rejected Lawrence's claim that he is entitled to equitable tolling. The Court noted that it has "not decided whether §2244(d) allows for equitable tolling," but held that—even if equitable tolling could apply—Lawrence had failed to show "extraordinary circumstances" to justify the untimely filing. "Attorney miscalculation [of a deadline] is simply not sufficient to warrant equitable tolling," and the fact that "the state courts appointed and supervised his [postconviction] counsel" could not assist Lawrence.

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented. In Justice Ginsburg's view, "[w]hen we are asked to review a state court's denial of habeas relief, we consider an application for that relief—not an application for federal habeas relief. She would therefore have read §2244(d)(2) similarly to §2244(d)(1): "[j]ust as a judgment of conviction is not 'final' until we have declined review or decided the case on the merits," an "application for state habeas relief . . . remain[s] 'pending' until we have disposed of the case." The dissent also contended that Congress would not have wanted to create a system in which federal courts and litigants are burdened with protective federal habeas filings.

Miller v. Alabama, - See Page 49

Wood v. Milyard, 10-9995. By a 7-2 vote, the Court held that a federal court of appeals has the authority to raise *sua sponte* a forfeited AEDPA statute of limitations defense. The Court further held, however, that the Tenth Circuit abused its discretion when it did so in this case because the state — by telling the district court that it "will not challenge, but [is] not conceding, the timeliness of Wood's habeas petition" — deliberately waived that defense. Petitioner Patrick Wood was convicted of murder. The state courts affirmed his conviction on direct appeal and denied an application for post-conviction relief that Wood filed in 2004. For unknown reasons, a state trial court never acted on an application for post-conviction relief that Wood had filed in 1995. Wood filed a federal habeas petition, which the district court initially dismissed as untimely. Upon reconsideration, the district court vacated the dismissal and

ordered the State of Colorado to file a response to the affirmative defense of timeliness. The state responded that it was not "challenging, but [did] not concede, the timeliness of the petition." The district court then denied the petition on the merits and for failure to exhaust state remedies. On appeal, the Tenth Circuit directed the parties to brief not only the merits of two of Wood's claims, but also the timeliness of Wood's federal habeas petition. The court later affirmed the denial of the petition solely on the ground that it was untimely (finding that Wood had abandoned his 1995 application before filing his 2004 application, which meant that the AEDPA limitations period was not tolled for long enough to make his federal petition untimely). In an opinion by Justice Ginsburg, the Court reversed.

The Court first agreed with the Tenth Circuit that a federal court of appeals has the authority *sua sponte* to raise a forfeited timeliness defense. The Court acknowledged that Habeas Corpus Rule 5(b) requires the state to plead a statute of limitations defense in its answer and that an affirmative defense once forfeited cannot be asserted on appeal. But the Court noted that it had previously recognized that habeas cases are "a modest exception to the rule that a federal court will not consider a forfeited affirmative defense." Specifically, in *Granberry v. Greer*, 481 U.S. 129 (1987), the Court held that a court of appeals can invoke a forfeited exhaustion defense. And in *Day v. McDonough*, 547 U.S. 198, 205 (2006), the Court held that district courts may consider, *sua sponte*, the timeliness of a petition. The Court in *Day* reasoned that the "statute of limitations promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." The Court in *Day* also stated that "it would make 'scant sense' to treat AEDPA's statute of limitations differently from other threshold constraints on federal habeas petitioners," such as the exhaustion defense addressed in *Granberry*. With that background, the Court held that "we decline to adopt an absolute rule barring a court of appeals from raising, on its own motion, a forfeited timeliness defense."

The Court, however, reiterated the distinction between a *waived* claim that has been knowingly and intelligently relinquished, and a *forfeited* claim that was merely left unpreserved. Because "a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system," "a federal court has the authority to resurrect only forfeited defenses," not expressly waived defenses. The Court declared that "[i]t would be an

abuse of discretion . . . for a court to override a State's deliberate waiver of a limitations defense" (internal quotation marks omitted). The Court found that was what happened here. The state's decision not to contest Wood's petition as untimely was not the result of inadvertent error. Rather, concluded the Court, the state expressed its clear and accurate understanding that it had an arguable timeliness defense, but deliberately urged the court to rule on the merits. Because the state intelligently and purposely waived its right to invoke a timeliness defense, the Tenth Circuit lacked the discretion to do so on its own motion.

Justice Thomas wrote an opinion concurring in the judgment, which Justice Scalia joined. Relying on the dissent in *Day* (which he had joined), Justice Thomas disagreed with the Court's ruling that a court of appeals can raise a timeliness defense on its own motion. He maintained that the forfeiture rule is fully consistent with habeas corpus procedure, and that *Day's* rule should not be extended to the courts of appeals, noting that appellate courts "are particularly ill-suited to consider issues forfeited below."

Statutory Construction

Mohamad v. Palestinian Authority, 11-88. The Court unanimously held that the term "individual" in the Torture Victim Protection Act of 1991 (TVPA) authorizes a cause of action against natural persons only, not against organizations. The TVPA imposes civil liability on "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" tortures or kills another individual. Petitioner Asid Mohamad is a relative of Azzam Rahim, a naturalized United States citizen who traveled to the West Bank and was arrested by the Palestinian Authority. The State Department concluded that Rahim was imprisoned, tortured, and killed by Palestinian Authority intelligence officers in Jericho. Mohamad filed suit under the TVPA against respondents, the Palestinian Authority and the Palestinian Liberation Organization, asserting the torture and extrajudicial killing of Rahim. The district court granted respondents' motion to dismiss, finding that the TVPA's authorization of suit against an "individual" applied only to "natural persons." The D.C. Circuit affirmed on the same ground. In an opinion by Justice Sotomayor, the Court affirmed.

The Court concluded that "[t]he ordinary meaning of the word, fortified by its statutory context," reveals that the term "individual" in the TVPA authorizes suit against "natural persons alone." The Court cited to several dictionaries in concluding that the "ordinary meaning" of

"individual" refers to a "human being, a person"; and it observed "that is how we use the word in everyday parlance." The Court also noted that it routinely used "individual" to denote a natural person, and that Congress did not ordinarily employ the word any differently. For example, the definition of "person" in the Dictionary Act, 1 U.S.C. §1, identified "individuals" as distinct from artificial entities. And the Congress that enacted the TVPA defined "person" in a separate Act to include "any individual or entity."

The Court agreed that Congress remains free to give "individual" a broader meaning, but stated that "there must be *some* indication Congress intended such" broader meaning. It found none here. To the contrary, the TVPA repeatedly uses the term "individual" to refer to the victim, which is consistent with reading the word to refer to natural persons. Then, after reiterating that "reliance on legislative history is unnecessary in light of the statute's unambiguous language," the Court found (in a part of its opinion not joined by Justice Scalia) that the broad reading urged by Mohamad was contrary to congressional statements recognizing the limited reach of the TVPA. The Court acknowledged Mohamad's concern that "precluding organizational liability may foreclose effective remedies for victims and their relatives," but stated that this "purposive argument cannot overcome the force of the plain text." Congress chose to take only a "modest step[]" and "it is not the province of this Branch to do otherwise."

Justice Breyer wrote a concurring opinion in which he stated his view that the word "individual" was alone insufficient to decide the case. He concluded, however, that the legislative history compensated for whatever interpretive inadequacies remained after considering the language alone.

Setser v. United States, 10-7387. By a 6-3 vote, the Court held that a federal district court has discretion to order a federal sentence to run consecutively to an anticipated state sentence. While already serving a five-year probationary term for a state drug offense, petitioner Monroe Ace Setser was arrested for possessing methamphetamine. The State of Texas indicted Setser for possession with intent to distribute the methamphetamine, and moved to revoke his probation on the prior offense. A federal grand jury also indicted Setser for the methamphetamine, to which he pleaded guilty. The district court sentenced Setser to 151 months to be served consecutive to any state sentence imposed for the probation violation, but

concurrent with any state sentence imposed on the new methamphetamine charge. Setser appealed to the Fifth Circuit, and while his appeal was pending, the state court sentenced him to five years in prison for the probation violation and ten years on the new charge, to be served concurrently. The Fifth Circuit affirmed the district court's sentence, although it recognized that it was "partially foiled" by the state sentence. In an opinion by Justice Scalia, the Court affirmed.

The Court noted that the provision of the Sentencing Reform Act of 1984 that deals with concurrent and consecutive sentences, 18 U.S.C. §3584, does not specifically address the situation here, where "the state sentence is not imposed at the same time as the federal sentence, and the defendant was not already subject to that state sentence." Setser and the Government argued that, because §3584 does not address this situation, the concurrent-vs.-consecutive determination is the exclusive province of the Bureau of Prisons (BOP), which is given authority by 18 U.S.C. §3621(b) to designate where the prisoner shall serve has federal sentence. By designating a federal prison as the place of confinement for the federal sentence (with respect to a prisoner presently serving a state sentence), the BOP effectively makes the two sentences consecutive. The Court disagreed, ruling that federal judges have long been understood to have the power to determine whether a sentence runs concurrently or consecutively, and "nothing in the Sentencing Reform Act, or any other provision of law, [shows] that Congress foreclosed the exercise of district courts' discretion in these circumstances." In particular, the Court declined to read §3584 — which, as noted, specifies federal courts' power to issue concurrent and consecutive sentences in some situations, but not this one — as meaning that federal courts lack the power in this situation.

Finally, the Court held that the state court's decision here to make both state sentences concurrent does not make the federal court's sentence unlawful (even though that thwarts the federal court's order that the federal sentence run concurrently to one of the state sentences and consecutively to the other). The Court ruled that "[t]his is where the Bureau of Prisons comes in": it may give Setser credit for "time served in state court based on the District Court's judgment that the federal sentence run concurrently with the state sentence for the new drug charges."

Justice Breyer wrote a dissenting opinion that Justices Kennedy and Ginsburg joined. He concluded that federal sentencing judges do not have the power to order a federal sentence

be consecutive to an anticipated state sentence because the sentencing judge would not normally know enough about the defendant's behavior that underlies the yet-to-be-imposed state sentence to render a fully informed sentence, as required by the Sentencing Guidelines.

Dorsey v. United States. Under the Anti-Drug Abuse Act (1986 Drug Act), the 5- and 10-yearmandatory minimum prison terms for federal drug crimes reflected a100-to-1 disparity between the amounts of crack cocaine and powder cocaine needed to trigger the minimums. Thus, the 5-year minimum was triggered by a conviction for possessing with intent to distribute 5 grams of crack cocaine but 500 grams of powder, and the 10-yearminimum was triggered by a conviction for possessing with intent to distribute 50 grams of crack but 5,000 grams of powder. The United States Sentencing Commission—which is charged under the Sentencing Reform Act of 1984 with writing the Federal Sentencing Guidelines—incorporated the 1986 Drug Act's 100-to-1 disparity into the Guidelines because it believed that doing so was the best way to keep similar drug-trafficking sentences proportional, thereby satisfying the Sentencing Reform Act's basic proportionality objective. The Fair Sentencing Act, which took effect on August 3, 2010, reduced the disparity to 18-to-1, lowering the mandatory minimums applicable to many crack offenders, by increasing the amount of crack needed to trigger the 5-year minimum from 5 to 28 grams and the amount for the 10-year minimum from 50 to 280 grams, while leaving the powder cocaine amounts intact. It also directed the Sentencing Commission to make conforming amendments to the Guidelines "as soon as practicable" (but no later than 90 days after the Fair Sentencing Act's effective date). The new amendments became effective on November 1, 2010. In No. 11–5721, petitioner Hill unlawfully sold 53 grams of crack in 2007, but was not sentenced until December 2010. Sentencing him to the 10-year minimum mandated by the 1986 Drug Act, the District Judge ruled that the Fair Sentencing Act's 5-year minimum for selling that amount of crack did not apply to those whose offenses were committed before the Act's effective date. In No. 11–5683, petitioner Dorsey unlawfully sold 5.5 grams of crack in 2008. In September 2010, the District Judge sentenced him to the 1986 Drug Act's 10year minimum, finding that it applied because Dorsey had a prior drug conviction and declining to apply the Fair Sentencing Act, under which there would be no mandated minimum term for an amount less than 28 grams, because Dorsey's offense predated that Act's effective date. The Seventh Circuit affirmed in both cases.

Held: The Fair Sentencing Act's new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders. Pp. 10–20.

(a) Language in different statutes argues in opposite directions. The general federal saving statute (1871 Act) provides that a new criminal statute that "repeal[s]" an older criminal statute shall not change the penalties "incurred" under that older statute "unless the repealing Act shall so expressly provide." 1 U. S. C. §109. The word "repeal" applies when a new statute simply diminishes the penalties that the older statute set forth, see *Warden* v. *Marrero*, 417 U. S. 653, 659–664, and penalties are "incurred" under the older statute when an offender becomes subject to them, *i.e.*, commits the underlying conduct that makes the offender liable, see *United States* v. *Reisinger*, 128 U. S. 398, 401. In contrast, the Sentencing Reform Act says that, regardless of when the offender's conduct occurs, the applicable sentencing guidelines are the ones "in effect on the date the defendant is sentenced." 18 U. S. C. §3553(a)(4)(A)(ii).

Six considerations, taken together, show that Congress intended the Fair Sentencing Act's more lenient penalties to apply to offenders who committed crimes before August 3, 2010, but were sentenced after that date. First, the 1871 saving statute permits Congress to apply a new Act's more lenient penalties to pre-Act offenders without expressly saying so in the new Act. The 1871 Act creates what is in effect a less demanding interpretive requirement because the statute "cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment." *Great Northern R. Co.* v. *United States*, 208 U. S. 452, 465. Hence, this Court has treated the 1871 Act as setting forth an important background principle of interpretation that requires courts, before interpreting a new criminal statute to apply its new penalties to a set of pre-Act offenders, to assure themselves by the "plain import" or "fair implication" of the new statute that ordinary interpretive considerations point clearly in that direction. Second, the Sen3 Cite as: 567 U. S. ____ (2012) Syllabus

tencing Reform Act sets forth a special and different background principle in §3553(a)(4)(A)(ii), which applies unless *ex post facto* concerns are present. Thus, new, lower Guidelines amendments apply to offenders who committed an offense before the adoption of the amendments but are sentenced thereafter. Third, language in the Fair Sentencing Act implies that Congress intended to follow the Sentencing Reform Act's special background principle here. Section 8 of the Fair Sentencing Act requires the Commission to promulgate conforming amendments to the Guidelines that "achieve consistency with other guideline provisions and applicable law." Read most naturally, "applicable law" refers to the law as changed by the Fair

Sentencing Act, including the provision reducing the crack mandatory minimums. And consistency with "other guideline provisions" and with prior Commission practice would require application of the new Guidelines amendments to offenders who committed their offense before the new amendments' effective date but were sentenced thereafter. Fourth, applying the 1986 Drug Act's old mandatory minimums to the post-August 3 sentencing of pre-August 3 offenders would create sentencing disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent. Fifth, not to apply the Fair Sentencing Act would do more than preserve a disproportionate status quo; it would make matters worse by creating new anomalies—new sets of disproportionate sentences—not previously present. That is because sentencing courts must apply the new Guidelines (consistent with the Fair Sentencing Act's new minimums) to pre-Act offenders, and the 1986 Drug Act's old minimums would trump those new Guidelines for some pre-Act offenders but not for all of them. Application of the 1986 Drug Act minimums to pre-Act offenders sentenced after the new Guidelines take effect would therefore produce a set of sentences at odds with Congress' basic efforts to create more uniform, more proportionate sentences. Sixth, this Court has found no strong countervailing considerations that would make a critical difference. Pp. 10–19.

(b) The new Act's lower minimums also apply to those who committed an offense prior to August 3 and were sentenced between that date and November 1, 2010, the effective date of the new Guidelines. The Act simply instructs the Commission to promulgate new Guidelines "as soon as practicable" (but no later than 90 days after the Act took effect), and thus as far as Congress was concerned, the Commission might have promulgated those Guidelines to be effective as early as August 3. In any event, courts, treating the Guidelines as advisory, possess authority to sentence in accordance with the new minimums. Finally, applying the new minimums to all who are sentenced after August 3 makes it possible to foresee a reasonably smooth tran4 DORSEY *v.* UNITED STATES Syllabus

sition, and this Court has no reason to believe Congress would have wanted to impose an unforeseeable, potentially complex application date. Pp. 19–20.

No. 11–5683, 635 F. 3d 336, and No. 11–5721, 417 Fed. Appx. 560, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined.

Holder v. Martinez Gutierrez, 10-1542. Under the Immigration and Nationality Act (INA), the Attorney General has the discretion to cancel the removal of an alien found to be removable if, *inter alia*, "the alien (1) has been lawfully admitted for permanent residence for not less than 5 years, [and] (2) has resided in the United States continuously for 7 years after having been admitted in any status[.]" 8 U.S.C. §1229b(a). The Court unanimously held that the Board of Immigration Appeals (BIA) acted reasonably when it refused to impute a parent's years of lawful residence or immigration status to a child, for purposes of applying this provision. Respondent Carlos Martinez Gutierrez illegally entered the United States in 1989 with his family. His father was admitted two years later as a lawful permanent resident (LPR), but Martinez Gutierrez was neither lawfully admitted nor granted LPR status until 2003. Two years after that, he was arrested for smuggling aliens. He admitted the offense and sought cancellation of removal. The immigration judge found that Martinez Gutierrez qualified for relief due to his father's immigration history, even though respondent could not do satisfy either requirement of §1229b(a) on his own. The BIA reversed, finding that a parent's history cannot be imputed to a child. The Ninth Circuit reversed and remanded the case back to the BIA to reconsider based on circuit precedent holding that a parent's immigration history can be imputed to the child. In an opinion by Justice Kagan, the Court reversed.

The Court stated that the BIA's construction of the statute was reasonable, and therefore upheld it under *Chevron* without resolving whether the statute permits another construction. The plain language of §1229b(a) "does not mention imputation, much less require it." And it speaks of "the alien" ("not, say, 'the alien or one of his parents'") to meet the provision's requirements. Martinez Gutierrez conceded this, but argued that several courts of appeals had construed §1229b(a)'s predecessor (§212(c)) as requiring the BIA to impute a parent's years of domicile to his or her child. (Section 212(c) gave the Attorney General discretion to cancel removal of an alien with LPR status who had maintained a "lawful unrelinquished domicile of seven consecutive years.") The Court, however, could not "conclude that Congress ratified an imputation requirement when it passed §1229b(a)." The Court emphasized that "Congress eliminated the very term — 'domicile' — on which the appeals courts had founded their imputation decisions." (Those courts had reasoned that children are presumed legally incapable of forming the intent needed to establish their own domicile.) The new statute relies on LPR status and residency instead. And the doctrine of congressional ratification of a previous interpretation applies only when a statute is reenacted without relevant change.

The Court also rejected Martinez Gutierrez's contention that the BIA's approach undermines the INA's goals of "providing relief to aliens with strong ties to the United States" and "promoting family unity." The Court found that these goals are not the only goals of the INA, "and Congress did not pursue them to the *n*th degree." The Court refused to "read a silent statute as requiring (not merely allowing) imputation just because that rule would be family-friendly." Finally, the Court rejected Martinez Gutierrez's argument that the BIA has acted arbitrarily because it has accepted "imputation under other, similar statutory provisions." The Court found a coherent pattern to the BIA's actions: it "imputes matters involving an alien's state of mind, while declining to impute objective conditions or characteristics." The Court found that "the five- and seven-year clocks in §1229b(a) do not hinge on any state of mind but on the objective facts of immigration status and place of residence."

Judulang v. Holder, 10-694. The Court unanimously held that the Board of Immigration Appeals' (BIA) "comparable-grounds" policy for applying §212(c) of the Immigration and Nationality Act in deportation cases is "arbitrary and capricious" under the Administrative Procedure Act. Until it was repealed in 1996, §212(c) granted the Attorney General the discretion to admit certain excludable aliens, and the Court has held that §212(c)'s relief must remain available to aliens whose removal is based on a guilty plea entered prior to §212(c)'s repeal. See *INS v. St. Cyr*, 553 U.S. 289, 326 (2001). Although §212(c) by its terms applies only to exclusion proceedings, in 1976 the Second Circuit held that certain disparities in the treatment of excludable and deportable aliens violated equal protection; since that time the BIA has applied §212(c) to deportation proceedings. Section 212 (c)'s application in the deportation context has been "tricky business," however, and the BIA used a variety of approaches before definitively settling on the comparable-grounds rule in 2005. Under that rule, "[i]f the deportation ground consists of a set of offenses 'substantially equivalent' to the set of offenses making up an exclusion ground, then the alien can seed §212(c) relief." However, "if the deportation ground charged covers significantly different or more or fewer offenses than any exclusion than any exclusion ground, the alien is not eligible for a waiver . . . even if the particular offense committed falls within an exclusion ground."

Petitioner Joel Judulang is a native of the Philippines who entered the United States in 1974 at the age of eight, and has lived continuously in the United States as a lawful permanent resident since then. In 1988 he pleaded guilty to voluntary manslaughter after he took part in a

fight in which another person shot and killed someone. In 2005, after he pleaded guilty to another criminal offense involving theft, the Department of Homeland Security (DHS) instituted deportation proceedings against him. DHS charged Judulang with having committed an "aggravated felony" involving "a crime of violence" based on his 1988 manslaughter conviction. The immigration judge ordered Judulang's deportation, and the BIA affirmed. The BIA held that Judulang could not apply for §212(c) relief under its comparable-grounds rule because the "crime of violence" deportation ground is not comparable to any exclusion ground, including the one for crimes involving moral turpitude. The Ninth Circuit affirmed, relying on circuit precedent upholding the BIA's comparable-grounds approach. In an opinion by Justice Kagan, the Court reversed.

The Court ruled that, [b]y hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory catagories – a matter irrelevant to the alien's fitness to reside in this country – the BIA has failed to exercise its discretion in a reasoned manner." The Court noted that if Judulang were seeking entry to the country, he would be eligible for §212(c) relief because his voluntary manslaughter conviction falls within the exclusion ground for "a crime involving moral turpitude." Although the Court declined to decide whether the BIA ever may limit §212(c)'s scope in deportation cases as compared with exclusion cases, it held that any such limitations must, at a minimum, be based on "non-arbitrary, 'relevant factors'" that bear some relation "to an alien's fitness to remain in the country." They cannot be based, as here, on "an irrelevant comparison between statutory provisions." Moreover, held the Court, there was a second "layer of arbitrariness" in the comparable-grounds rule: when an alien's prior conviction falls within multiple deportation grounds, only one of which corresponds to an exclusion ground, the alien's eligibility for relief "may rest on the happenstance of an immigration official's charging decision."

The Court rejected the United States' three arguments in support of the comparable-grounds rule. First, the Court rejected the Government's argument that the comparable-grounds rule is "more faithful to" the statutory text, holding that the text provides no guidance because §212(c) "refers solely to exclusion decisions"; its extension to deportation cases occurs in "a text-free zone." Second, the Court held that the comparable-grounds rule cannot be supported by its alleged long-standing vintage, stating that "[a]rbitrary action becomes no less so by simple dint of repetition," and also finding that the rule is not actually longstanding. Third,

the Court disagreed with the Government's assertion that rule is reasonable because it saves time and money, holding that while "[c]ost is an important factor for agencies to consider in many contexts,. . . cheapness alone cannot save an arbitrary agency policy." In addition, the Court expressed doubts about the actual cost savings from the comparable-grounds rule, noting that Judulang's proposed rule does not appear cost-intensive, and that the BIA is free to "devise another, equally economical policy" as long as it is not arbitrary and capricious and otherwise comports with established law.

Vartelas v. Holder, 10-1211. In a 6-3 opinion, the Court held that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) does not apply retroactively to preclude a lawful permanent resident from returning to the United States following a brief trip abroad based on his conviction of a crime before IIRIRA's effective date. Petitioner Panagis Vartelas, a native of Greece, became a permanent resident of the United States in 1989. In 1994, he pleaded guilty to conspiring to make a counterfeit security and served four months in prison. Vartelas traveled to Greece in 2003 to visit his parents. He was denied reentry to the United States, treated as an inadmissible alien, and placed in removal proceedings. Under the law when Vartelas pleaded guilty, an alien with his record could travel abroad for brief periods without jeopardizing his resident alien status. Two years after Vartelas pleaded guilty, however, Congress enacted IIRIRA, which provides that lawful permanent residents who have committed certain specified offenses may be permanently removed from the United States after they return from such a trip. 8 U.S.C. §1101(a)(13)(C)(v). Vartelas challenged his removability, asserting that §1101(a)(13)(C)(v) does not apply retroactively to aliens who committed the qualifying crimes prior to IIRIRA's enactment. The Immigration Judge denied relief and the Board of Immigration Appeals affirmed. The Second Circuit also affirmed, reasoning that Vartelas did not rely on the prior legal regime at the time he committed his crime. In an opinion by Justice Ginsburg, the Court reversed.

The Court relied on its longstanding presumption against retroactive legislation, which applies (in Justice Story's words) when retroactive application of a law would "tak[e] away or impai[r] vested rights acquired under existing laws, or creat[e] a new obligation, impos[e] a new duty, or attac[h] a new disability, in respect to transactions or considerations already past." The Court concluded that the presumption applied here because IIRIRA does not specify the provision's temporal reach and application of §1101(a)(13)(C)(v) would "attach a 'new disability'

to conduct over and done well before the provision's enactment." Specifically, prior to the law, Vartelas was allowed to travel to Greece for brief periods and return to the United States. The Court said that loss of the ability to travel abroad is itself a harsh penalty that can separate close family members living abroad. The Court rejected the Government's argument that the relevant event for retro-activity purposes was the alien's return to the United States, not his past conviction. "[T]he reason for the 'new disability' imposed on [Vartelas] was not his lawful foreign travel," but rather was "his conviction, pre-IIRIRA"; that was the conduct that IIRIRA targeted. Finally, the Court rejected the Second Circuit's reasoning, finding that it has never required a party challenging application of a statute on these grounds to show detrimental reliance on the prior law.

Justice Scalia wrote a dissenting opinion, which Justices Thomas and Alito joined. The dissent argued that the primary activity regulated by §1101(a)(13)(C)(v) is reentry into the United States, not past crimes. Accordingly, the provision "has no retroactive effect on Vartelas because the reference point here — Vartelas's readmission to the United States after a trip abroad -- occurred years after the statute's effective date."

Kawashima v. Holder, 10-577. By a 6-3 vote, the Court held that convictions for willfully filing false tax returns and aiding and abetting the filing of false tax returns are crimes "involv[ing] fraud or deceit," and thus are aggravated felonies and deportable offenses under the immigration laws. Petitioners Akio and Fusako Kawashima, husband and wife, are Japanese citizens who had been lawful permanent residents of the United States since 1984. In 1997, Mr. Kawashima pleaded guilty to one count of willfully making and subscribing a false tax return in violation of 26 U.S.C. §7206(1); Mrs. Kawashima pleaded guilty to one count of aiding and assisting in the preparation of a false tax return in violation of 26 U.S.C. §7206(2). The then-INS charged them with being deportable pursuant to 8 U.S.C. §1227(a)(2)(A)(iii) as aliens who had been convicted of "an aggravated felony." The INS alleged that the convictions qualified as aggravated felonies under §§1101(a)(43)(M)(i) and (ii). Clause (i) specifies offenses "involv[ing] fraud or deceit in which the loss to the victim . . . exceeds $10,000"; Clause (ii) specifies offenses relating to tax evasion "in which the revenue loss to the Government exceeds $10,000." After their hearing, the Immigration Judge found in favor of the INS and ordered the Kawashimas' removal. The Immigration Appeals Board affirmed, as did the Ninth Circuit. The Ninth Circuit held that Mr. Kawashima's conviction qualified as an aggravated felony under

Clause (i) because it involved "fraud or deceit" and because it resulted in a loss to the government in excess of $10,000. The court also held that Mrs. Kawashima's conviction involved "fraud or deceit," but it remanded to determine whether her conviction caused the government to lose in excess of $10,000. In an opinion by Justice Thomas, the Court affirmed.

The Court reasoned that even though "fraud" and "deceit" are not express elements of the crimes for which the Kawashimas were convicted, "Clause (i) refers more broadly to offenses that 'involv[e]' fraud or deceit — meaning offenses with elements that necessarily entail fraudulent or deceitful conduct." That standard was met here. The Court then rejected the Kawashimas' argument that Congress intended to exclude tax crimes from the scope of Clause (i) because it expressly included tax evasion in Clause (ii); that including tax crimes in the scope of Clause (i) would render Clause (ii) redundant; and that §1101(a)(43)(M) is ambiguous and should be construed in their favor. The Court rejected the first of these arguments by finding it too weak to overcome the plain language of the statute. The Court rejected the second argument, reasoning that it is "more likely that Congress specifically included tax evasion offenses under 26 U.S.C. §7201 in Clause (ii) to remove any doubt that tax evasion qualifies as an aggravated felony." The Court found that they are not redundant because a person could be found guilty of tax fraud under §7201 in circumstances not involving fraud or deceit, if, for example, the person filed a truthful tax return, but moved assets to avoid *paying* taxes. Finally, the Court found the statute "clear enough that resort to the rule of lenity is not warranted."

Justice Ginsburg filed a dissenting opinion, which Justices Breyer and Kagan joined. The dissent found the majority's statutory interpretation "dubious," reasoning that including tax crimes within the scope of Clause (i) renders Clause (ii) "superfluous." In the dissent's view, Clause (i) does not include any tax offenses; therefore, the Kawashimas were not convicted of aggravated felonies subjecting them to deportation. The dissent emphasized that Clause (ii) singles out tax *evasion*, which is "the gravest of offenses against the revenues." According to the dissent, "[i]t is thus understandable that Congress would single out tax evasion, as it did in Clause (ii), specifically designating it, and no other tax crime, an 'aggravated felony' for deportation purposes."

Limitations on Liability §1983

Minneci v. Pollard, 10-1104. In an 8-1 opinion, the Court held that the Ninth Circuit erred in implying an Eighth Amendment-based damages action (a *Bivens* action) against employees of a privately operated federal prison. Respondent Richard Lee Pollard was a prisoner at a federal facility operated by a private company. He filed a complaint against several employees of that company alleging that they violated the Eighth Amendment's prohibition on cruel and unusual punishment by denying him adequate medical care following an incident where he fell, possibly fracturing both his elbows. The district court dismissed Pollard's complaint, in part because state tort law offered an adequate opportunity for Pollard to pursue damages against the employees. The Ninth Circuit reversed, finding that the existence of those state remedies did not displace a *Bivens* action. In an opinion authored by Justice Breyer, the Court reversed.

The Court had stated in *Wilkie v. Robbins,* 551 U.S. 537 (2007), that the decision whether to recognize a *Bivens* remedy is a two-step inquiry: First, "there is the question whether any alternative, existing process for protecting the [constitutionally recognized] interest" militates in favor of the judiciary not providing a new remedy. Second, "even in the absence of a [state] alternative," the federal courts must make "a remedial determination" that such a federal remedy is appropriate." Reviewing its *Bivens* decisions over the years, the Court concluded that "*Wilkie* fairly summarizes the basic considerations that underlie those decisions" and "consequently appl[ied] its approach here." Doing so, the Court ruled that "Pollard cannot assert a *Bivens* claim" because his "Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law." Specifically, "state law imposes general tort duties of reasonable care (including medical care) on prison employees in every one of the eight States where privately managed secure federal facilities are currently located." And although "state tort law may sometimes prove less generous that would a *Bivens* action," state law remedies and a *Bivens* action "need not be perfectly congruent." Rather, the controlling question "is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations." The Court concluded that state law provided such incentives here.

Rehberg v. Paulk, 10-788. The Court unanimously held that a law enforcement witness who testifies in a grand jury proceeding is entitled to the same absolute immunity from suit under 42 U.S.C. §1983 as a witness who testifies at trial. Petitioner Charles Rehberg sent

anonymous faxes to several persons criticizing the management of a hospital in Albany, Georgia. In response, the local district attorney's office — allegedly as a favor to the hospital's leadership — instituted a criminal investigation of Rehberg. Respondent James Paulk, the district attorney's office's chief investigator, testified three times before grand juries, resulting in three indictments, all of which were later dismissed. Rehberg brought a §1983 action against Paulk, alleging that he conspired to present, and did present, false testimony to the grand jury. The district court denied Paulk's motion to dismiss, but the Eleventh Circuit reversed on the ground that Paulk had absolute immunity. In so holding, the court rejected Rehberg's claim that a sole "complaining witness" before a grand jury was not entitled to absolute immunity. In an opinion by Justice Alito, the Court affirmed.

The Court reiterated that §1983 "is construed in light of common-law principles" and that the Court therefore "look[s] to the common law for guidance in determining the scope of its immunities." In doing so, the Court "take[s] what has been termed a 'functional approach,'" that "identif[ies] those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation" that some form of immunity was necessary. That being said, the Court also noted that its "precedents have not mechanically duplicated the precise scope of the . . . immunity that the common law provided to protect those functions." For example, because public prosecutors only became commonplace after 1871, the Court has granted absolute immunity to them for malicious prosecution claims even though that specific immunity developed after 1871 and private prosecutors did not receive absolute immunity in 1871.

With that background, the Court stated that it has given trial witnesses absolute immunity with respect to claims based on the witness's testimony so that the truth-seeking function at trial would not be impaired by witnesses reluctant to come forward or who shade their testimony to avoid being sued. The Court concluded that those same factors "apply with equal force to grand jury witnesses." In both situations, perjury is a sufficient deterrent for false testimony. Nor, held the Court, "is there any reason to distinguish law enforcement witnesses from lay witnesses." Indeed, as the Court held in *Briscoe v. LaHue*, 460 U.S. 325 (1983), law enforcement witnesses face employment-related sanctions that do not apply to lay witnesses, making absolute immunity from a §1983 suit even more justified. The Court rejected Rehberg's attempt to circumvent such immunity with a conspiracy claim, declining "to endorse a rule of

absolute immunity that is so easily frustrated." The Court also rejected Rehberg's reliance on cases holding that a "complaining witness" is not entitled to absolute immunity. The Court held that, as that term was understood in 1871, a "complaining witness" was "a party who procured an arrest and initiated a criminal prosecution." Testifying "was not the distinctive function performed by a complaining witness." As a consequence, "a law enforcement officer who testifies before a grand jury" — such as Paulk — "is not at all comparable to a 'complaining witness.'" Finally, the Court observed that allowing grand jury witnesses to be sued would subvert the secrecy so necessary for grand jury proceedings.

Reichele v. Howards – See Page 4

Messerschmidt v. Millender – See Page 13

Ryburn v. Huff – See Page 12

Filarsky v. Delia, 10-1018. The court unanimously held that a private individual temporarily retained by the government to carry out its work is entitled to the same immunity from a 42 U.S.C. §1983 action as a full-time government employee. Respondent Nicholas Delia was a firefighter for the City of Rialto, California when he became ill responding to a toxic spill. The City became suspicious of Delia's extended absence and hired private investigators to conduct surveillance of him. The investigators saw Delia buy building supplies at a home-improvement store, which led the City to conclude that Delia was missing work not due to his illness but rather to do work on his home. The City initiated a formal investigation into Delia's absence and hired petitioner Steve Filarsky, an experienced employment lawyer, to interview him. Filarsky and three fire department officials interviewed Delia, who admitted to buying the materials but denied having done any work on his home. With the approval of the department, Filarsky tried to obtain Delia's consent to view the unused materials. After Delia refused, Filarsky ordered him to produce the materials for inspection. Over the objection of Delia's attorney, Filarsky signed an order, approved by the chief, directing Delia to produce the materials. Delia later produced the materials to the satisfaction of the fire officials. Delia then filed a §1983 action against the City, the fire department, Filarsky, and other individuals, claiming they violated his Fourth Amendment rights. The district court granted summary judgment for all individual defendants, concluding they were entitled to qualified immunity. The Ninth Circuit affirmed with respect to all defendants except for Filarsky; it concluded that he was

not entitled to qualified immunity because he was not a city employee. In an opinion by Chief Justice Roberts, the Court reversed.

The Court has long held that defendants in §1983 actions have immunities from liability similar to those that existed at common law in 1871, the year Congress enacted §1983. The Court here noted that as of 1871 local governments were smaller and were mainly administered part-time by people who, simultaneous with their government service, also carried on some regular business or employment as means of support. Indeed, found the Court, "private individuals temporarily serving the public" often conducted criminal prosecutions. Further, found the Court, "the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." The Court therefore concluded that "immunity under §1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis."

The Court stated that "[n]othing about the reasons [it has] given for recognizing immunity under §1983 counsels against carrying forward the common law rule." Such immunity protects government's ability to carry out its functions "by helping to avoid 'unwarranted liability' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." Those concerns are "of vital importance regardless whether the individual sued as a state actor works full-time or on some other basis." Indeed, private individuals who do not depend on government work may decline public engagements out of fear that "they could be left holding the bag" if they work alongside government employees who enjoy immunity. The Court also noted the line-drawing problems that would be created by a rule that awards immunity depending on the "particular relationship" a defendant has with the government for whom he worked: "[a]n uncertain immunity is little better that no immunity at all."

Finally, the Court distinguished *Wyatt v. Cole,* 504 U.S. 158 (1992), and *Richardson v. McKnight,* 521 U.S. 399 (1997). In *Wyatt,* an individual used a state replevin law to achieve purely private ends. And *Richardson* was a self-consciously "narrow" decision dealing with prison guards employed by "a private firm, systematically organized to assume a major lengthy

administrative task . . . with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms." Neither of these situations applied to Filarsky, or to "the typical case of an individual hired by the government to assist in carrying out its work."

Justice Ginsburg filed a concurring opinion emphasizing that the Ninth Circuit on remand should deny qualified immunity if Filarsky "knew or should have known that his conduct violated a right 'clearly established'" at the time of the incident. She pointed out that since Delia was threatened with "disciplinary action, up to and including termination," Filarsky's conduct may have violated "clearly established" law by threatening termination to induce the surrender of a known constitutional right. Justice Sotomayor also wrote a concurring opinion. She stated that not "*every* private individual who works for the government in some capacity necessarily may claim qualified immunity when sued under 42 U.S.C. §1983" and that each case should be decided as it arises.

Wallace v. Kato, 05-1240. The Court held that, in a lawsuit filed under 42 U.S.C. §1983 based on an unlawful arrest, the cause of action accrues when the arrest ends, not when the criminal conviction that resulted from the arrest is set aside. In this case, Andre Wallace had confessed to murder during a January 1994 arrest effected by Chicago police officers. He was convicted of first-degree murder, but the Appellate Court of Illinois held the arrest unlawful and concluded that the illegal arrest rendered the confession inadmissible. After the court remanded for a new trial, the state—on April 10, 2002—dismissed the charges against Wallace. In April of 2003, Wallace filed his §1983 action. The district court deemed the complaint time barred and the Seventh Circuit affirmed, holding that his cause of action accrued at the time of his arrest. Through an opinion by Justice Scalia, the Court affirmed.

The Court noted that, although §1983 borrows state law statutes of limitations (here, Illinois' two-year personal-injury statute of limitations), "the accrual date of a §1983 cause of action is a question of federal law." That federal law "conform[s] in general to common-law tort principles." The general common-law accrual rule is that accrual occurs when the plaintiff could have first filed suit—here, as soon as the wrongful arrest occurred. And the specific accrual rule for the torts of false arrest and false imprisonment (the most analogous torts) leads to the same result. "[F]alse imprisonment consists of detention without legal process" and therefore "ends once the

victim becomes held *pursuant to such process.*" Here, the cause of action accrued "when legal process was initiated against [Wallace]"—that is, when Wallace "appeared before the examining magistrate and was bound over for trial."

The Court rejected Wallace's argument that, under *Heck v. Humphrey,* 512 U.S. 477 (1994), the cause of action did not accrue until the state dismissed the criminal charges. The plaintiff in *Heck* filed a §1983 action raising claims that, if true, would have rendered his conviction invalid. The Court held that Heck possessed no claim for relief under §1983 until his conviction already had been reversed, expunged, "declared invalid by a state tribunal," or "called into question by a federal court's issuance of a writ of habeas corpus." The Court here concluded that, because Wallace had not yet been convicted when his false imprisonment ended, *Heck* is inapplicable. Wallace seeks a rule "that goes well beyond *Heck*: that an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside." "The impracticality of such a rule should be obvious." The Court also refused to read *Heck* to mean that the limitations period for filing Wallace's false-arrest cause of action would be tolled once he was convicted. "Under such a regime, it would not be known whether tolling is appropriate by reason of the *Heck* bar until it is established that the newly entered conviction would be impugned by the not-yet-filed, and thus utterly indeterminate, §1983 claim." Finally, the Court rejected the proposition—asserted in Justice Breyer's dissent—that equitable tolling could apply while the validity of Wallace's arrest was being litigated in state court.

Justice Stevens, joined by Justice Souter, filed a concurring opinion. Justice Stevens agreed that *Heck* was inapplicable, but for different reasons than the majority. In Justice Stevens' view, *Heck's* central premise was that if federal habeas relief is available to a prisoner, he must challenge a conviction or sentence through a federal habeas petition before filing a §1983 action that challenges the conviction or sentence on the same grounds. Here, however, Wallace's claim sounded in the Fourth Amendment and, under *Stone v. Powell,* 428 U.S. 465, 494 (1976), Fourth Amendment claims rarely are cognizable on federal habeas. *Heck* thus cannot assist Wallace, Justice Stevens concluded. Justice Breyer, joined by Justice Ginsburg, dissented. Justice Breyer agreed that *Heck* cannot assist Wallace, but would have remanded so that the district court could determine if equitable tolling principles rendered the lawsuit timely. In Justice Breyer's view, "equitable tolling could apply where a §1983 plaintiff reasonably claims that the unlawful behavior of which he complains was, or will be, necessary to a criminal conviction."

Cert Granted

Chaidez v. United States, 11-820. At issue is whether the rule announced in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), applies retroactively to cases on collateral review. In *Padilla*, the Court held that an attorney must inform his or her client whether a guilty plea "carries a risk of deportation." Petitioner Roselva Chaidez, a native of Mexico, was a lawful permanent resident in 2003 when she was indicted in federal district court on three counts of mail fraud. With the advice of counsel, Chaidez pleaded guilty to two counts in December 2003 and was sentenced to probation. Chaidez did not file a direct appeal. Under federal law, an alien who is "convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. §1227(a)(2)(A)(iii). The government initiated removal proceedings against Chaidez in 2009 because her guilty plea to a fraud in excess of $10,000 made her eligible for removal as an aggravated felon. To avoid removal, Chaidez sought to have her conviction overturned by moving for a writ of *coram nobis*, alleging ineffectiveness of counsel because her attorney failed to inform her that her guilty plea could lead to removal. She claimed that she would not have pleaded guilty had she known of the immigration consequences. While Chaidez's motion was pending, the Court issued *Padilla*.

The district court ruled that *Padilla* did not announce a new rule under *Teague v. Lane*, 489 U.S. 288 (1989), but rather was an application of *Strickland v. Washington*, 466 U.S. 668 (1984). The court then considered the merits of Chaidez's *coram nobis* motion and vacated her conviction. The Seventh Circuit reversed in a 2-1 opinion. 655 F.3d 684. The court held that *Padilla* announced a new rule for retroactivity purposes because before *Padilla* many state and federal courts had concluded that deportation consequences were not direct consequences that an attorney was required to discuss with the defendant to render effective assistance under the Sixth Amendment. Rather, most courts had ruled that deportation was a collateral consequence about which advice was not required. The Seventh Circuit also noted that in *Padilla* itself the two-Justice concurrence found *Padilla*'s requirement that a criminal attorney provide specific advice on immigration law to be unprecedented, and the two-Justice dissent stated that the requirement lacked any "basis in text or principle." The Seventh Circuit also noted that the *Padilla* majority itself acknowledged that *Hill v. Lockhart*, 474 U.S. 52 (1985), which extended *Strickland* to guilty pleas, "does not control the question before us." All told, held the Seventh Circuit, a reasonable jurist prior to *Padilla* could have reached a conclusion contrary to *Padilla*. *Padilla* thus announced a new rule.

In her petition, Chaidez argues the *Padilla* was merely an application of *Strickland*, and that "applying *Strickland* to a new set of facts does not create a new rule." She purports to find support in

cases in which the Court has held that 28 U.S.C. §2254(d)(1) did not bar the grant of habeas relief based on ineffective-assistance claims, and lower court rulings that *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), did not create new rules. Chaidez further asserts (quoting Supreme Court precedent) that "the mere existence of conflicting authority does not necessarily mean a rule is new" and that, "at least since IIRIRA's dramatic changes to immigration law went into effect, there has been no dispute that professional norms require advice on deportation consequences." The United States disagrees with Chaidez on the merits, but agreed that certiorari should be granted because the lower courts are divided on the issue.

Clapper v. Amnesty Int'l USA, 11-1025. At issue is whether certain U.S. citizens (attorneys, journalists, and human rights, labor, legal, and media organizations) have Article III standing to challenge the constitutionality of §702 of the Foreign Intelligence Surveillance Act of 1978 (FISA), which was added by 50 U.S.C. §1881a, the FISA Amendments Act of 2008 (FAA). FISA authorizes the Attorney General (AG) and Director of National Intelligence (DNI) to obtain an order from a FISA court authorizing the electronic surveillance of non-United States persons outside the United States for purposes of collecting foreign intelligence. The FAA changed the FISA scheme by no longer requiring the government to submit an individualized application to the FISA court identifying the particular targets or facilities to be monitored. Instead, the AG and DNI can apply for a mass surveillance authorization by filing with the FISA court a written certification and supporting affidavits attesting generally that a significant purpose of the electronic surveillance is to obtain foreign intelligence. Under the FAA, unlike the preexisting FISA scheme, the FISA court does not monitor compliance on an ongoing basis. Rather, that duty belongs to the AG and DNI, who must submit their assessments to the FISA court, as well Congress.

The plaintiffs challenged the FAA's constitutionality in federal court, arguing that it violates the First and Fourth Amendments by allowing "the government to collect these communications *en masse* without specifying the individuals or facilities to be monitored," and without adequate judicial oversight or findings. The plaintiffs filed declarations stating that their work "requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, journalistic sources, witnesses, experts, foreign governmental officials, and victims of human rights abuses located outside the United States." And the people with whom the plaintiffs communicate include "people the U.S. Government believes or believed to be associated with terrorist organizations," "political and human rights activists who oppose governments that are supported economically or militarily by the U.S. Government," and "people located in geographic areas that are a special focus of the U.S.

Government's counterterrorism or diplomatic efforts." Although the district court granted the government's motion for summary judgment, agreeing that the plaintiffs lacked standing, a Second Circuit panel reversed. The court acknowledged that the plaintiffs cannot be targeted for surveillance under the FAA because they are United States persons. The court found they nonetheless have standing based on (1) their reasonable fear that the government will cause them a "future injury" by intercepting their communications with persons surveilled under the law; and (2) their claim that they have suffered a present injury causally connected to the FAA by spending funds and taking burdensome measures to preserve the confidentiality of their communications with targeted individuals. The Second Circuit denied the government's motion for a rehearing en banc on a 6 to 6 vote.

The government's petition argues that the Second Circuit's ruling was unprecedented and inconsistent with the Supreme Court's decisions that require proof of non-conjectural and imminent injury in fact and reject as insufficient a self-imposed injury stemming from the asserted chilling effect of the plaintiffs' fears. The government also argues that granting such standing requires that the constitutionality of foreign intelligence gathering in the vitally important national security context will be litigated in the abstract without an appropriate factual context. The government asserts that the Second Circuit departed from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), in that it based standing on a conjectural injury that was not imminent and that the plaintiffs' self-inflicted present injury resulted from their own fear, a form of "subjective chill" that cannot form the basis for standing. The government also contends that the Second Circuit erred when it found that invalidating the FAA would redress the plaintiffs' injury: the presence of other statutory tools at the AG's and DNI's disposal that allow them to engage in similar electronic surveillance means the plaintiffs will still have cause to fear being overheard.

Logan v. United States, 06-6911. The Court will decide whether a state conviction that did not result in deprivation of civil rights constitutes a predicate conviction—one supporting an enhanced sentence—under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e)(1). If a person is convicted of being a felon in possession of a firearm, and if his prior "convictions" include three "violent felonies" or serious drug offenses, §924(e)(1) requires a 15-year minimum sentence. An offense classified by a state as a misdemeanor may qualify as a violent felony if the offense was punishable by more than two years of imprisonment. 18 U.S.C. §921(a)(20)(B), 924(e)(2)(B). ACCA, however, excludes from consideration "[a]ny conviction . . . for which a person has been pardoned or has had civil rights restored." *Id.* §921(a)(20). In this case, James Logan's record included three misdemeanor battery convictions under Wisconsin law, each carrying a maximum sentence of three years'

imprisonment. Logan argued that his prior state convictions should not count for ACCA purposes because they never resulted in the loss of civil rights in the first place— and therefore fit within the "civil rights restored" exception. Both the district court and the Seventh Circuit rejected that argument. 453 F.3d 804.

The Seventh Circuit relied on 18 U.S.C. §921(a)(20)'s "unambiguous" text, which speaks to civil rights being *restored*. Because Logan never lost his civil rights in the first place, he never had them restored. Adopting the Second Circuit's approach in *McGrath v. United States,* 60 F.3d 1005 (2d Cir. 1995), the Seventh Circuit concluded that §921(a)(20) prohibits reliance on prior state convictions only if those convictions initially resulted in the loss of civil rights. The court noted, however, that the First Circuit had reached a contrary conclusion in *United States v. Indelicato,* 97 F.3d 627 (1st Cir. 1996). According to that court, a literal reading of §921(a)(20) would produce an absurd result by providing longer sentences for those whose offenses had not justified a loss of civil rights than for those whose offenses initially justified loss of those rights but who later regained the rights. The United States responds that this disparate treatment "is not irrational." "Congress sought to exclude convictions for which a State has forgiven a defendant . . . . Unlike the restoration of civil rights, . . . retention of rights following conviction does not imply forgiveness."

Smith v. United States, 11-8976. Under review is a D.C. Circuit decision holding that "[o]nce the Government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from [the] conspiracy by a preponderance of the evidence." Petitioners argue that the government should have to prove beyond a reasonable doubt that they were members of the conspiracy during the relevant period.